



Business Law Section of the State Bar of California

## Health Law Committee E-Bulletin

Kenneth Yood  
Co-Chair  
555 South Flower Street  
Los Angeles, CA 90071  
213-892-9353  
[kenethyood@paulhastings.com](mailto:kenethyood@paulhastings.com)

Michael Dowell  
Vice Chair  
2029 Century Park E, 6th Floor  
Los Angeles, CA 90067  
310-557-2009  
FAX 310-551-0283  
[mdowell@tocounsel.com](mailto:mdowell@tocounsel.com)

Christine Cohn  
Vice Chair - Communications  
1901 Ave. of the Stars, Ste  
1600  
Los Angeles, CA 90067  
310-228-3743  
FAX 310-228-3905  
[ccohn@sheppardmullin.com](mailto:ccohn@sheppardmullin.com)

Julie Simer  
Vice Chair - Education  
5 Park Plaza, Suite 450  
Irvine, CA 92614  
949-833-8550  
FAX 949-833-8540  
[jsimer1@enterprisecounsel.com](mailto:jsimer1@enterprisecounsel.com)

Carlisle Lewis, III  
Co-Secretary  
8698 Spectrum Center Court  
San Diego 92123  
858-499-3026  
FAX 858-499-4065  
[ky.lewis@sharp.com](mailto:ky.lewis@sharp.com)

Rick Wolf  
Co-Secretary  
9300 Valley Children's Place  
Madera, CA 93636  
559-353-5008  
FAX 559-353-5311  
[rwolf@childrenscentralca.org](mailto:rwolf@childrenscentralca.org)

### JULY AUGUST 2009 CASE DEVELOPMENTS

#### IN CALIFORNIA HEALTH LAW

*By Suzanne K. Nusbaum of Impartia*

#### ANTI-TRUST

***Doe v. Abbott Laboratories***, 571 F.3d 930 (9th Cir., July 7, 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/07/07/08-17699.pdf>.

Allegations of monopoly leveraging through pricing conduct in two markets do not state a claim under § 2 of the Sherman Act, **15 U.S.C. § 2**, absent an antitrust refusal to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market. Here Abbott sold Novir to its competitors, to be used as a booster in conjunction with their own products. Abbott also combined Novir into its own boosted product, Kalestra, and sold it at a price that exceeded its costs. There was no refusal to deal at the booster level and no below cost pricing at the boosted level. Such conduct does not state a § 2 claim.

***In re: Cipro Cases I & II***, JCCP Proceeding Nos. 4154 & 4220, Superior Court of California, County of San Diego, Minute Order, August 21, 2009, available at <http://www.fdalawblog.net/files/cipro---rev-pymt---ca-sup-ct-jccp4154.pdf>.

A patent infringement settlement involving reverse payments to a generic drug manufacturer to delay the market entry of a generic pharmaceutical did not violate the Cartwright Act, **Bus. & Prof. Code, § 16720 et seq.** The settlement agreement was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version. The plaintiffs did not allege that patent infringement action was objectively baseless, sham litigation, or that there was fraud on the Patent Office; and they failed to establish that the settlement was otherwise unlawful. The Court's finding that the settlement agreement did not violate the Cartwright Act also precluded plaintiffs' claims of unfair competition in violation of the Unfair Competition Act

([Bus. & Prof. Code, § 17200 et seq.](#)) and of the common law tort of monopolization, as they were based on the same factual allegations.

### **ARBITRATION**

*Rion Alicia Newton Rodriguez v. Superior Court of LA Co.*, 2009 Cal. App. LEXIS 1411 (Cal. Ct. App., [2d App. Distr., Div. 7, August 25, 2009](#)), available at <http://www.courtinfo.ca.gov/opinions/documents/B212603.PDF>.

Where the person who signed the medical negligence arbitration agreement died before the expiration of the thirty day rescission period provided by [Code of Civil Procedure §1295\(c\)](#), full compliance with [§1295](#) requirements was impossible. Therefore, the agreement to arbitrate was not enforceable. The Appeals Court vacated the Superior Court's order compelling arbitration and ordered that the medical malpractice case be tried before a jury.

“When weighing the competing interests of an individual's constitutional right to a jury trial against the Legislative preference for arbitration of medical malpractice claims codified in § 1295, in the absence of proof of the individual's knowing and voluntary waiver of such rights, the individual's constitutional rights must prevail.”

### **HOSPITAL REIMBURSEMENT**

*Hospital Cmtee. for Livermore-Pleasanton Areas v. Oakland*, 2009 Cal. App. LEXIS 1403 (Cal. App. Ct., 1<sup>st</sup> App. Distr., Div. 1, August 24, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/A122674.PDF>.

City police transported a prisoner whose probation and parole had been revoked from the city jail to the county jail. Intake personnel at the county jail refused to accept the prisoner because he was too ill and directed that he be taken to plaintiff's hospital. The plaintiff sued the City of Oakland and County of Alameda to recover the cost of the prisoner's hospitalization.

[Penal Code §4011.5](#) authorizes removal of a prisoner from a city or county jail to a hospital for treatment. Penal Code § 4011(b) provides that the hospitalization costs shall be charged against the county in the case of a prisoner in or taken from the county jail, or against the city in the case of a prisoner in or taken from the city jail.

The city or county's liability under [Penal Code § 4011](#) is determined by the

nature of the offense, not custody or control. Under the nature of the offense rule, the County, not the City, is responsible here because the prisoner was hospitalized while incarcerated for violations of probation and parole under state law. The County is also liable for the hospital costs under [Government Code § 29602](#). The summary probation revocation and no bail remand order was the functional equivalent of a commitment to county jail via arraignment.

### **INSURANCE COVERAGE**

[\*Yeager v. Blue Cross of California\*](#), 175 Cal.App.4th 1098 (Cal. Ct. App., 2d Distr., Div. 8, July 15, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/B207571.PDF>.

[Health and Safety Code § 1374.55](#) obligates health care service plans to offer coverage for treatment of infertility. Blue Cross offered infertility coverage of \$2,000 per year to the plaintiff's employer. The employer did not buy the infertility coverage, partially due to its cost.

Blue Cross' offer of coverage complied with the [§1374.55](#) coverage mandate. [Section 1374.5](#) does not require Blue Cross to provide infertility coverage, only to offer it. Nor does the statute dictate the terms and conditions of infertility coverage; it only provides that they may be agreed upon. There was no requirement for any particular coverage at any particular price. The trial court properly granted summary judgment to the defendant on the plaintiff's claims for unfair competition and false advertising.

[\*Bosetti v. The United States Life Insurance Company in the City of New York\*](#), 175 Cal. App. 4th 1208 (Cal Ct. App., 2nd App. Distr., Div. 3, July 17, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/B206896.PDF>

An employer's group long-term disability insurance policy limited benefits for disabilities due to "mental, nervous or emotional disorder" to only two years. Because mental symptoms may arise from a separate physical causal event, or physical symptoms may arise from a separate mental causal event, and because the term "mental disorder" was not precisely defined in the policy, the court found the term was ambiguous. It then asked whether coverage was consistent with the insured's reasonable expectations, and concluded that if the insured's physical problems contributed to the disability or were a cause or a symptom, the limitation would not apply.

Summary judgment for the insurer on the breach of contract and declaratory judgment claims was reversed because a triable issue of fact existed as to

whether plaintiff's benefits were properly terminated. There was evidence in the record supporting plaintiff's claim that, when her employment was terminated, she was totally disabled from "any employment" and that such disability had a physical component. There was competing evidence that the plaintiff was capable of performing sedentary or light physical work, and was therefore not entitled to further benefits. The Court commented that this was a classic breach of contract case, and a jury should determine, after weighing all of the evidence, whether plaintiff was, in fact, entitled to additional benefits.

Because the insurer had an objectively reasonable factual and legal basis for the denial of further benefits after two years, and there was no evidence showing that the insurer had made any intentional misrepresentations or had intentionally inflicted any emotional distress on the insured, the Appeals Court directed the trial court to grant summary judgment to the insurer on the plaintiff's bad faith and intentional tort causes of action.

**LITIGATION:**  
**JUSTICIABILITY; INJUNCTIVE RELIEF;**  
**FIRST AMENDMENT FREEDOM OF RELIGION**

**Stormans, Inc. v. Selecky**, 571 F.3d 960 (9<sup>th</sup> Cir., July 8, 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/07/08/07-36039.pdf>.

The district court abused its discretion by preliminarily enjoining the enforcement of new rules promulgated by the Washington State Board of Pharmacy that require pharmacies to deliver lawfully prescribed Federal Drug Administration –approved medications and prohibit discrimination against patients, on the ground that the rules violate pharmacies' or their licensed pharmacists' free exercise rights under the First Amendment to the U.S. Constitution. The district court incorrectly applied a heightened level of scrutiny to a neutral law of general applicability, and issued an injunction that was overbroad.

A for-profit corporation has standing to assert the right of its owners to free exercise of religion.

The proper legal standard for preliminary injunctive relief requires a party to demonstrate that he is likely to succeed on the merits, is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

The right to freely exercise one's religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

religion prescribes (or proscribes). Under the Free Exercise Clause, the freedom to believe is absolute, but the freedom to act cannot be. Conduct remains subject to regulation for the protection of society. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. An individual's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.

### **LITIGATION: MEDICAL LIENS**

**Gilman v. Dalby**, 176 Cal. App. 4th 606 (Cal. Ct. App, 3rd App. Distr., August 10, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/C050294.PDF>

An attorney's lien for fees and costs of litigation takes priority over a contractual medical lien. Where the amount of the legal fees and costs equals or exceeds the amount of the settlement, leaving nothing to collect via a medical lien, no claim for conversion will lie. There can be no claim for breach of fiduciary duty by the owner of the medical lien, who is not a client, against an attorney who is not a party to the medical lien contract.

### **MANAGED CARE: MEDICAID**

**AlohaCare v. State of Hawaii, Department of Human Services**, 572 F.3d 740 (9<sup>th</sup> Cir, July 14, 2009), available at <http://www.ca9.uscourts.gov/datastore/opinions/2009/07/14/08-16589.pdf>

The district court found that AlohaCare could not bring claims for violations of the Medicaid Act under 42 U.S.C. § 1983. The 9<sup>th</sup> Circuit Court affirmed the dismissal of the complaint for failure to state a claim for which relief could be granted.

Claims brought pursuant to 42 U.S.C. § 1983 must be based on deprivation of an unambiguously conferred right in order to support a cause of action. Nothing in the Medicaid Act, 43 U.S.C. § 1396b(m) clearly and unambiguously gives federally qualified health care organizations a right to be eligible to contract to provide Medicaid services.

Practice tip: Make your claims of statutory violation under the Supremacy Clause, which is presumptively available to remedy a state's ongoing violation of federal law.

**Independent Living Ctr. Of S. Cal., Inc. v. Maxwell-Jolly**, No. 08-57016, 2009 U.S. App. LEXIS 17692 (9th Cir. August 7, 2009), (not for publication), available at

<http://www.ca9.uscourts.gov/datastore/memoranda/2009/08/07/08-57016.pdf>. .

The preliminary injunction to enjoin AB 5's ten percent Medi-Cal reimbursement rate reduction as to non-emergency medical transportation services and home health services, was properly granted by the District Court. California's failure to evaluate the effect of the reduced payments in accordance with the standards set forth in *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), rendered the cuts unlawful under 42 U.S.C. §1396a(a)(30(A).

### **PHYSICIAN DISCIPLINE**

**Luis H. Watson v. Superior Court of Sacramento Co.**, 176 Cal. App. 4th 1407 (3rd App. Distr. August 25, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/C059957.PDF>.

The California Medical Board may discipline a physician for unprofessional conduct arising out of the use of alcoholic beverages where the use is dangerous to the licensed physician or to any other person or the public. [Bus. & Prof. Code § 2239\(a\)](#) is sufficiently clear to provide fair warning of the prohibited conduct, and meets due process constitutionality requirements.

Here the physician had been arrested for driving under the influence four times. On two occasions, the doctor was involved in an accident and in each instance he drove recklessly. There was no doubt that on each occasion, he posed a danger to himself and others. Once a misdemeanor complaint was dismissed; twice no criminal charges were filed; and the fourth time criminal charges were pending at the time of the disciplinary hearing. Criminal convictions are not required to support disciplinary action.

Driving while under the influence of alcohol demonstrates an inability or unwillingness to obey legal prohibitions against such conduct and constitutes a serious breach of a duty owed to society. Such repeated conduct by a physician tends to undermine public confidence in and respect for the medical profession. Such conduct reflects poorly on the physician's common sense and professional judgment, which are essential to the practice of medicine.

**Bearman v. California Medical Board**, No. B210868, 2009 Cal. App. LEXIS 1417 (Cal. Ct. App., 2nd App. Distr., Div. 6, August 26, 2009), available at

<http://www.courtinfo.ca.gov/opinions/documents/B210868.PDF>.

A physician, who had been investigated by the California Medical Board for unprofessional conduct for prescribing medical marijuana for attention deficit disorder, filed a civil rights action under 42 U.S.C. § 1983 against the Board, its officers and investigators. The Superior Court dismissed the action without leave to amend, finding the claims barred by immunity. The Appeals Court affirmed.

Immunity from liability under § 1983 is governed by federal law. Qualified immunity is the norm. To avoid the qualified immunity defense, the plaintiff must show that the defendants' conduct violated clearly known and established statutory or constitutional rights. Despite California's Compassionate Use of Marijuana Act, possession of marijuana is a federal crime, not a clearly established right. It is unclear whether a physician may lawfully prescribe marijuana to treat attention deficit disorder. The conduct of Medical Board officials in issuing an administrative subpoena to the physician for his patient's medical records was objectively reasonable.

### **TAXATION**

**Abbott Laboratories v. Franchise Tax Board**, 175 Cal. App. 4th 1346 (Cal. Ct. App., 2nd App. Distr., Div. 3, July 21, 2009), available at <http://www.courtinfo.ca.gov/opinions/documents/B204210A.PDF>.

The Franchise Tax Board denied the plaintiff's § 24402 dividends received deduction after *Farmer Bros. Co. v. Franchise Tax Bd.* (2003), 108 Cal.App.4th 976, decided that §24402(a) violated the commerce clause of the United States Constitution by discriminating against corporations that engage in interstate commerce. Section 24402(a) allowed a tax deduction to a corporation which received a dividend declared from income of a corporation subject to California tax, but did not allow a tax deduction to a corporation receiving a dividend declared from income of a corporation not subject to California tax.

The plaintiff sued for a tax refund after paying taxes on dividends it received from income of a corporation, asserting that the court should reform the statute by severing the unconstitutional language from its remaining valid provisions. The Court found that the statute was grammatically and functionally separable, but not volitionally separable.

To be volitionally separable, one must establish that the remainder of the statute is complete in itself and would have been adopted by the legislative body had the legislature had foreseen its partial invalidation. Here the Legislature only intended to exempt dividends declared from income subject



to California taxation. The main purpose of the statute would be defeated by severing subdivision (a) and declaring that the remainder of the statute to be constitutional. The reformation urged by the plaintiff did not effectuate the legislative intent to avoid double taxation of California corporate income, and therefore was rejected.

***Suzanne K. Nusbaum provides Mediation, Settlement Conferences, Neutral Evaluation, Peer Review Hearings, and Arbitration for Healthcare Litigation. She may be contacted at [snusbaum@impartia.com](mailto:snusbaum@impartia.com), [www.impartia.com](http://www.impartia.com), 408-399-2688.***

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